90-599

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT L. FIACCO,
Petitioner,
vs.
CITY OF LOS ANGELES; DARYL GATES, individually and in his official capacity as Chief of Police for the City of Los Angeles; TERRENCE DYMENT, ROBERT KURTH and CARL WILHITE, individually and in their official capacities as Los Angeles Police Officers,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does respondents' withholding of exculpatory evidence from petitioner Robert L. Fiacco, despite an order of the criminal court before which Fiacco faced charges directing that exculpatory evidence be produced, give rise to a cause of action under Title 42 U.S.C. section 1983, as a violation of Fiacco's constitutional right to have exculpatory evidence produced, notwithstanding that Fiacco did not suffer a conviction as a result?

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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1990

ROBERT L. FIACCO,
Petitioner,
vs.
CITY OF LOS ANGELES; DARYL GATES, individually and in his official capacity as Chief of Police for the City of Los Angeles; TERRENCE DYMENT, ROBERT KURTH and CARL WILHITE, individually and in their official capacities as Los Angeles Police Officers,
Respondents.

PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully prays that a Writ of Certiorari issue to review a decision of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Memorandum Decision of the United States Court of Appeals for the Ninth Circuit is reprinted as Appendix A herein. The judgment of the District Court for the Central District of California is reprinted as Appendix B herein.

JURISDICTION

On July 10, 1990 the United States Court of Appeals for the Ninth Circuit filed its Memorandum Decision affirming the grant of summary judgment on behalf of all defendants below, respondents herein, by the United States District Court for the Central District of California, the Honorable Richard Gadbois presiding. The judgment of the Court of Appeals was entered the same day.

The jurisdiction of this Court is sought pursuant to Rule 10.1(c) of the Rules of the Supreme Court of the United States, 28 U.S.C., on the grounds that the Ninth Circuit Court of Appeals rendered an opinion in this case which decided an important question of federal law which has not been, but should be, settled by this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment of the United States Constitution, section 1 states:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person

> within its jurisdiction the equal protection of the laws."

Section 1983 of the Civil Rights Act states:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . ."

42 U.S.C. §1983.

STATEMENT OF THE CASE

Proceedings Below

This case was brought under Title 42 U.S.C. section 1983. Jurisdiction was conferred upon the District Court by Title 28 U.S.C. sections 1331, 1332 and 1343. Petitioner Robert L. Fiacco alleged, *inter alia*, that his right to exculpatory evidence in a criminal proceeding, pursuant to the doctrine of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), had been violated. Respondents moved for, and the District Court granted, summary judgment on behalf of all defendants as to the causes of action brought pursuant to the Civil Rights Act, except a cause of action, pursuant to *Monell*

v. Dept. of Soc. Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), alleging an unconstitutional policy, practice or custom of the City of Los Angeles to withhold exculpatory evidence from police officers charged with criminal misconduct. The trial court reserved judgment on such claim. Fiacco's pendent state law claims were dismissed.

Fiacco appealed the District Court's ruling to the United States Court of Appeals for the Ninth Circuit. The granting of summary judgment as to all defendants pursuant to Federal Rules of Civil Procedure, Rule 56(b), was a final judgment of the District Court. Jurisdiction of the appeal from that judgment was proper pursuant to Title 28 U.S.C. section 1291.

The Court of Appeals affirmed the District Court's grant of summary judgment. In its Memorandum, the Court of Appeals stated there was no due process violation "if the evidence is disclosed to the defendant at a time when the disclosure remains of value," and "the evidence came out at trial during cross-examination of the complaining witnesses and Fiacco was able to make full use of the information to impeach their testimony." According to the Court of Appeals, "Fiacco thus had an opportunity to cure any prejudice caused by the delayed disclosure of the impeachment evidence at issue."

Statement of Facts

On Saturday, January 10, 1987, two young women were interviewed by Sgt. James M.B.S. Wilson of the L.A.P.D., Central Traffic Division. They had contacted the Police department and claimed they had observed Fiacco, a Los Angeles police officer in uniform, engaged in an improper sex act with a woman in a car near Griffith Park in Los Angeles on the previous day,

January 9th. When they first told this story to Wilson, the women lied. They said the alleged misconduct had first been observed by a teen-aged niece who was with them in the park. When Wilson told them he had to know the name and location of the niece so that she could be interviewed, the women admitted their lie. They changed their story, and claimed that they, themselves, had observed the alleged misconduct.

The next day, Sunday, January 11th, Lt. Robert Kurth of the L.A.P.D., Internal Affairs Division (I.A.D.),[1] contacted Sgt. Wilson as to the claims against Fiacco. Wilson told Kurth what the women had said, and informed Kurth about the lie as to who first observed the alleged misconduct. Kurth did nothing to obtain a formal report from Wilson as to the initial contact, including the lie. In deposition Kurth testified he was not certain but he may have told I.A.D. investigators Carl Wilhite and Connie Castruita about the women's lie to Wilson. Wilhite and Castruita denied any recollection of being told about the lie by Kurth.

Fiacco, an L.A.P.D. Central Traffic motorcycle officer with more than 23-years' experience, denied engaging in any improper sex acts while he and a woman friend, Cynthia Samuels, were seated in her car on that Friday afternoon, January 9, 1987.

I.A.D. investigators presented their report of this case to the Los Angeles District Attorney's Office for possible filing of criminal charges. However, they failed to reveal the original lie by the complaining witnesses.

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[1] Internal Affairs is the Division of the Los Angeles Police Department which investigates and prosecutes administrative charges of misconduct against sworn personnel within the Department. Its officers also serve as investigators for criminal prosecutions of L.A.P.D. officers.

Even without such knowledge, Deputy District Attorney Thomas Gray recommended that the case was not strong enough for filing. Nonetheless, the I.A.D. personnel then took the case to Deputy City Attorney Alice Hand of the Los Angeles City Attorney's Office. Here, again, information about the original lie which had definitely been conveyed to I.A.D. Lt. Kurth (and may have been shared with Wilhite and Castruita) was not given to Deputy Hand.

On or about May 7, 1987 Fiacco was informed that he was being formally charged with a violation of California Penal Code §647(a), lewd conduct. Cynthia Samuels was also charged.

Samuels filed a timely motion for discovery in the criminal case. This motion specifically referenced a desire to obtain any exculpatory evidence in the possession or control of the prosecution, citing *Brady v. Maryland, supra,* for entitlement to this evidence. Fiacco joined in that motion for discovery. Although an order was issued by the Los Angeles County Municipal Court requiring that all exculpatory evidence be disclosed, the prosecution never informed either defendant of the original deception as to who, if anyone, had observed the alleged misconduct in Samuels' car. In fact, there is no indication that any prosecuting attorney was ever made aware of the witnesses' lies, this information having been suppressed at or soon after the time it was communicated to Lt. Kurth.

On June 23, 1987 Fiacco was relieved of duty with the Los Angeles Police Department.

The trial against Fiacco and Samuels commenced in July, 1987. Continuing to demonstrate bias, and seeking to slant evidence in such a manner as to increase the likelihood of convictions, Carl Wilhite committed several additional reprehensible acts ranging from improper

failure to report evidence to distortion of what witnesses had to say. A key point in the evidence at trial was the vantage from which the women claimed they had made their observations. Wilhite involved the original trial prosecutor, Deputy City Attorney Mark Burton, in an apparently inadvertent (from Burton's point of view) process of making it appear that the complaining witnesses had consistently agreed as to where they had been when they made their observations, and as to that location being as auspicious as it could be in support of their claims. This failure by Wilhite to report honestly as to changes in what the witnesses had said about their locations fatally compromised Burton's position in the case and, as an officer of the court, he had to withdraw from the prosecution so that an untainted Deputy City Attorney could take over.

Sgt. Wilhite also engaged in deceptive innuendo in reporting a conversation with a witness who was employed by the Greek Theatre, Kellie Castruita. Wilhite made it seem as though her partial observations were indicative of sexual misconduct. However, Castruita saw no such compromising positions as Wilhite implied. Wilhite also misrepresented the response of Greg Metoyer, employee of a dry cleaning business. Metoyer told Wilhite that his company's computers were down, so that there was no way to confirm or deny Samuels' claim that she had been to the cleaners that Friday. Instead, Wilhite reported that Metoyer did not locate any evidence to support Samuels' claims as to using the cleaning services that day, implying (dishonestly) that the evidence showed one of the defendants was being less then honest. Another misrepresentation by Wilhite also impacted upon Fiacco through his then-codefendant, Ms. Samuels. Wilhite reported that her doctor, Roscoe

Bigler, made light of the woman's health concerns. This was not the case.

Despite respondents' attempts to suppress it, the original lies by the complaining witnesses were discovered by the defense during trial. The last of the women to testify admitted upon cross-examination that she had first been interviewed by a Sgt. Wilson of the Central Traffic Division. The defense then called Wilson to testify and he revealed that he had originally been told a lie! Thus the jury only heard this critical credibility evidence after the deceitful witnesses had testified and been cross-examined by the defense, without the benefit of the knowledge that essential elements of their original story had been untrue.

On August 5, 1987 the trial ended with the jury deadlocked 11-1 for acquittal as to both defendants. The case was dismissed upon defense motion without opposition by the Deputy City Attorney in attendance. On August 7, 1987 Robert Fiacco, by his departmental defense representative, Ed Esqueda, requested that he be reinstated in light of the favorable jury trial outcome. This request for reinstatement was denied.

ARGUMENT

The facts of this case clearly indicate a deprivation of Fiacco's constitutional rights under *Brady v. Maryland,* actionable under 42 U.S.C. section 1983. The respondents knowingly withheld exculpatory evidence, even in the face of a discovery motion and order from the criminal court directing that the requested evidence be produced. Nonetheless, the Court of Appeals upheld the granting of summary judgment by the District Court on the grounds that the fortuitous discovery of the exculpatory evidence by the defense at trial obviated any

violation of Fiacco's right to due process. We believe this was an erroneous ruling.

THE WITHHOLDING OF EXCULPATORY EVIDENCE FROM A CRIMINAL DEFENDANT AFTER A SPECIFIC REQUEST AND ORDER FOR PRODUCTION OF THE EVIDENCE IS A CLEAR CONSTITUTIONAL VIOLATION

> "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."
>
> *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215, 218 (1963).
>
> "Impeachment evidence . . . as well as exculpatory evidence, falls within the *Brady* rule."
>
> *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481, 490 (1985).

In the underlying criminal action, Fiacco's co-defendant, Cynthia Samuels, made a motion specifically requesting that exculpatory evidence as understood under *Brady* be disclosed. Fiacco joined in that motion. At the time the request was made the prosecution, and specifically the police officers in I.A.D. who had investigated the alleged criminal activity and urged the criminal

prosecution against Fiacco, possessed evidence which clearly fell within the scope of this request, namely the knowledge that at least one of the complaining witnesses had lied about who, if anyone, had seen the alleged criminal activity.

According to the authority quoted above, when such evidence in the government's possession was withheld a violation of Fiacco's right to due process of law occurred. Fiacco should now be allowed to redress this violation by way of an action under the Civil Rights Acts.

FIACCO SHOULD BE ALLOWED TO BRING AN ACTION UNDER 42 U.S.C. §1983 TO REDRESS THE VIOLATION OF HIS CONSTITUTIONAL RIGHT TO OBTAIN EXCULPATORY EVIDENCE AND REPRESS SUCH VIOLATIONS

We are aware of no decisions of this Court addressing the question whether it is proper to bring an action under 42 U.S.C. section 1983 in order to redress a violation of the constitutional right to exculpatory evidence when there is no conviction in the criminal case where the evidence was withheld. However, several decisions of the Courts of Appeals give a clear indication that such is the state of the law. Foremost among these is *Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988). *Jones* involved a young man prosecuted for murder. Charges against him were dropped when it came to light that the police had withheld exculpatory evidence from him. Nonetheless, Jones was allowed to proceed, and he prevailed, in an action brought under section 1983 after the jury found that he was the victim of a plan to "railroad" him. *Id.* at 992.

Another case illustrative of Fiacco's right to proceed to vindicate his right to a fair trial under the Civil Rights Act notwithstanding the fact that he was not convicted is *Chavis v. Rowe*, 643 F.2d 1281 (7th Cir. 1981). Chavis was a prisoner in Illinois state prison accused of stabbing a guard. He was found guilty of this charge by the prison Adjustment Committee, transferred to segregation, and deprived of two years statutory good time. This finding was appealed to the prison Inquiry Board, and from there to the Administrative Review Board of the Illinois Department of Corrections.

The Administrative Review Board discussed the investigation of the stabbing incident with the assistant warden, who provided them with a copy of an investigative report regarding the incident. This report had not been provided to Chavis during the Adjustment Committee proceedings, and contained the results of a polygraph examination administered to another prisoner, who had provided information about the stabbing. The examination indicated that the other prisoner was telling the truth when he identified a prisoner other than Chavis as being the one who had stabbed the guard.

The Seventh Circuit discussed the alleged *Brady* violation alleged in Chavis' section 1983 action. It recognized that an argument could be made that no *Brady* violation occurred because the fact finder — in this case, the Adjustment Committee — was given the exculpatory report and considered it in reaching its conclusion. But the Court did not accept this rationale, instead holding:

> "*Brady* is also based on the right of the defendant to prepare the best defense he can and bring to the court's attention any evidence helpful to his case. . . . Here, Chavis was deprived

> of his ability to make his own use of this exculpatory evidence before it was given to the fact-finders. . . . If Chavis had been given the material, and argued it to the Committee, it may have been forced to consider the material more seriously. . . . We therefore cannot say that defendant's failure to disclose the statement was immaterial or harmless error."
>
> 643 F.2d at 1286.

Also instructive in this area is the case of *Geter v. Fortenberry*, 849 F.2d 1550 (5th Cir. 1988). This case involved an action under section 1983 brought by a man convicted of robbery, whose conviction was vacated when the prosecution dismissed the indictment while his conviction was on appeal. The plaintiff filed an action under 42 U.S.C. section 1983 against numerous municipalities, police departments, police officers and prosecutors. Of interest in the instant action is the Fifth Circuit's treatment of the allegations against the individual police officers in reversing the District Court's finding that qualified immunities protected the officers from suit.

The Court discussed the charges against one policeman, Officer Kuhn, to the effect that he had procured false identification by unlawful means and deliberately concealed exculpatory evidence. Because such conduct would violate clearly established law, the Fifth Circuit held that the case had to be remanded to the trial court to determine whether such conduct had occurred, thereby removing Officer Kuhn's actions from the protection of any applicable immunities. 849 F.2d at 1560-61. Obviously, the Fifth Circuit recognized that a civil rights action could be based upon such conduct —

conduct qualitatively the same as that involved in the instant action — or it would have been completely incongruous to remand the action.

The case of *Kompare v. Stein*, 801 F.2d 883 (7th Cir. 1986) is also of interest. Kompare was accused of manslaughter in connection with the death of her son. One of the defendants was a medical examiner, who had performed an autopsy on the child. The examiner had reported that the cause of death was abdominal hemorrhaging caused by a torn small bowel mesentery, a condition which normally occurs only as a result of a violent blow to the abdomen. Later, the examiner looked at slides that had been made of the mesentery tissue and determined that the tissue was abnormal in such a manner as would allow a tear of the mesentery without violent trauma. The examiner testified at the criminal trial that her opinion as to the cause of death did not change after the discovery of the abnormality. Nonetheless Mrs. Kompare was found not guilty.

Kompare sued the medical examiner under section 1983 alleging, *inter alia*, that the examiner did not reveal exculpatory evidence as required by, among other authority, *Brady v. Maryland*, 801 F.2d at 890. The District Court, and the Seventh Circuit, ruled that the examiner enjoyed a qualified immunity as there was no clearly established standard regarding the disclosure of such potentially exculpatory evidence by a medical examiner. Nonetheless, both courts necessarily understood Kompare's suit to be viable under the Civil Rights Act in order to reach the issue of qualified immunity.

Ybarra v. Reno Thunderbird Mobil Home Village, 723 F.2d. 675 (9th Cir. 1984), is the only case arising in the Ninth Circuit of which we are aware involving a suit under 42 U.S.C. section 1983 challenging governmental action which infringed upon a criminal defendant's right

to a fair trial by the withholding of exculpatory evidence. *Ybarra* involved a claim that the defendants destroyed or permitted the destruction of exculpatory evidence needed for the defense. 723 F.2d at 677. However, the court did not reach the question whether there was a *Brady* violation because the only defendants sued were prosecuting attorneys entitled to absolute immunity. Nonetheless, *Ybarra* is relevant for what it does not say. There was no reason to decide whether immunity attached if a *Brady* violation was not cognizable in a §1983 action for damages. Interestingly, the Ninth Court noted (in dictum) that section 1983 confers jurisdiction over the question whether there has been a constitutional deprivation under *Brady*. 732 F.2d at 681.

Ybarra also explained that a declaratory judgment may be appropriate in addition to injunctive relief or damages. *Id.* But the court did not address these issues because the plaintiff was seeking a federal remedy for his confinement as a criminal under state law. This Court has held that the exclusive remedy in such a circumstance is *habeas corpus*, requiring the exhaustion of state remedies. *Id.*, citing *Preiser v. Rodriguez*, 411 U.S. 475, 499 n. 14, 93 S.Ct. 1827, 1841 n. 14, 36 L.Ed.2d 439 (1973).

Additionally, we would note that Fiacco is also entitled to pursue nominal damages, if not more, as discussed in *Draper v. Coombs*, 792 F.2d 915 (9th Cir. 1986); *see also Carey v. Piphus*, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978) (nominal damages appropriate in action under the Civil Rights Act in absence of compensable damages).

Geter, *Kompare* and *Ybarra* are all of interest because of what they do not say. The Federal Courts are courts of limited jurisdiction. If the facts alleged in these cases had not been sufficient to establish a claim under section

1983 (and therefore jurisdiction under 28 U.S.C. section 1331), there would have been no authority in the Federal Courts to decide the cases. It seems highly improbable that all the various federal courts involved with the decisions discussed above simply failed to consider whether the allegations before them presented questions over which they had jurisdiction. It is, therefore, essential to these decisions that a criminal defendant who is not convicted nonetheless is entitled to bring an action under the Civil Rights Act to challenge the withholding of exculpatory evidence.

Clearly, Fiacco should have been allowed to proceed under the Civil Rights Act to obtain redress for the respondents' violation of his right to a fair trial. In this regard, it appears that the Court in *Chavis, supra,* in discussing the failure to disclose the investigative report regarding the prison stabbing, summed up the basis for such an action best when it said:

> "It appears that simple fair play required disclosure to him of the exculpatory material or its substance, and that failure to disclose resulted in the miscarriage of justice. . . . We conclude that the complaint stated a due process claim in this respect."
>
> 643 F.2d at 1286.

IN THIS SUIT UNDER THE CIVIL RIGHTS ACT, THE NINTH CIRCUIT INCORRECTLY UTILIZED THE STANDARD APPLICABLE WHEN A CRIMINAL CONVICTION IS CHALLENGED

In the instant action the Ninth Circuit affirmed the granting of summary judgment by the District Court on the grounds that there is no due process violation "if the evidence is disclosed to the defendant at a time when the disclosure remains of value," and that "the evidence came out at trial during cross-examination of the complaining witnesses and Fiacco was able to make full use of the information to impeach their testimony." According to the Court of Appeals, "Fiacco thus had an opportunity to cure any prejudice caused by the delayed disclosure of the impeachment evidence at issue." In support of this decision, the Court of Appeals cited two of its decisions, *United States v. Juvenile Male,* 864 F.2d 641, 647 (9th Cir. 1988) and *United States v. Gordon,* 844 F.2d 1397, 1403 (9th Cir. 1988). First, this is simply incorrect. The information was discovered by the defense only after the deceitful witnesses had been examined without the benefit of this crucial information as to their credibility. Second, with all due respect to the Ninth Circuit, the doctrine underlying the decision in those two cases, albeit correct in a criminal appeal of conviction, was incorrectly applied in the instant action.

Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), *Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) and *United States v. Bagley,* 473 U.S. 667, 105 S.Ct 3375, 87 L.Ed.2d 481 (1985), all address the remedies available to a criminal defendant who, upon being convicted,

discovers exculpatory evidence which was withheld. Both *Juvenile Male* and *Gordon* also involved an appellant who was trying to overturn his conviction based on the alleged withholding of exculpatory evidence. In this light it is understandable that this Court stated in *Bagley*: "A constitutional error occurs, *and* the conviction must be reversed, only if the evidence is *material* in the sense that its suppression undermines confidence in the outcome of the trial." 473 U.S. at 678 (emphasis added).

This requirement of materiality is clearly appropriate given the extremely important public concerns involved when a conviction is overturned and a criminal is released into society's midst. Yet such concerns are not relevant here. Fiacco was, and is, innocent. He does not seek to overturn a conviction. Rather, he seeks to redress the reprehensible, systematic violation of his right to exculpatory evidence committed by those officers of the state empowered to subject him to the burden of criminal process.

The language from *Bagley* quoted above clearly demonstrates that a constitutional error occurs at the moment exculpatory evidence is suppressed. If such evidence is material, *then,* in the context of a criminal appeal, the conviction must be overturned. However, this rule of law dictates the outcome of a criminal appeal (only possible after a conviction). It does not address the question whether concealing exculpatory evidence violates a defendant's rights in the absence of a conviction. While this Court has not, we believe, addressed this specific issue, we now ask that it forge a rule of law which would allow the innocent, as well as the guilty, to seek redress for violation of the constitutional right to exculpatory evidence. Respondents herein, and others charged with the power to brand one as a criminal, should not be able to hide behind the shield of their own

malice or ineptitude. They should not enjoy a windfall of immunity simply because the defense herein was lucky enough to discover the evidence which respondents tried to suppress. To hold otherwise would create a rule of law allowing any misconduct, any attempt, in the words of the Seventh Circuit to "railroad" a defendant, as long as the process is stopped short of conviction. Such a rule of law would not be fair nor honest, nor in keeping with our concept of ordered liberty. It is left now to this Honorable Court to declare that such is not the state of a person's rights under the Constitution of the United States.

CONCLUSION

For all the foregoing reasons it is respectfully submitted that the decision of the Court of Appeals affirming the judgment of the District Court granting the defendants' Motion for Summary Judgment should be reversed, and this case should be remanded for further proceedings so that Robert L Fiacco, an innocent man, may proceed to vindicate his constitutional right to a fair determination of criminal charges brought against him, unfettered by the deceitful attempts of those who would violate fundamental principles of justice to further their own designs.

DATED: October 5, 1990

Respectfully submitted,

STEVENSON & DePASQUALE

PAUL R. DePASQUALE

Attorneys for Petitioner
ROBERT L. FIACCO

APPENDIX A

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
JUL 10 1990
Cathy A. Catterson, Clerk
U.S. Court of Appeals

ROBERT L. FIACCO,
Plaintiff-Appellant,

v.

CITY OF LOS ANGELES; DARYL F. GATES, Chief of Police, et al,
Defendants-Appellees.

No. 89-55530
D.C. No. CV-88-0143-RG

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Richard A. Gadbois, Jr., District Judge, Presiding

Argued and Submitted June 8, 1990
Pasadena, California

Before: HUG, BOOCHEVER, and BEEZER,
Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

The appellant, at the time a Los Angeles police officer, was accused of engaging in an act of oral copulation, in violation of Cal. Pen. Code § 647(a) (West Supp. 1990). After a jury deadlocked 11-1 for acquittal, the case was dismissed without opposition.

Fiacco then brought this civil action against the appellees: the City of Los Angeles; Police Chief Daryl Gates in his official and individual capacity; Terrence Dyment, the former Captain of the Internal Affairs Division, in his individual and official capacity; and two police officers who worked with the Internal Affairs Division, Lt. Robert Kurth and Sgt. Carl Wilhite, in their individual and official capacities (collectively, "the officers").

Fiacco's civil complaint had ten counts. The first four counts were based on the Civil Rights Act, 42 U.S.C. § 1983. The remaining counts alleged violations of state law. The district court granted the officers' motion for summary judgment on Fiacco's section 1983 claims. The court then declined to exercise its discretion to hear Fiacco's six state claims for relief. Fiacco now appeals and asks this court to reverse the district court's grant of summary judgment on his four section 1983 claims. We affirm.

Fiacco's first and third claims for relief were not briefed. These claims are therefore deemed abandoned. Fed. R. App. P. 28(a)(2); *Meehan v. County of Los Angeles*, 856 F.2d 102, 105 n.1 (9th Cir. 1988).

Fiacco's second section 1983 claim alleged a due process violation based on Fiacco's right to receive exculpatory evidence. It is well settled that a prosecutor's failure to reveal material evidence, upon request, related to a criminal defendant's guilt or punishment, offends due process. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). This rule also applies to impeachment

evidence. *United States v. Bagley*, 473 U.S. 667, 676 (1985).

Fiacco filed a motion for discovery of exculpatory evidence in the possession or control of the prosecution and its agents. A discovery order granting the request was issued. The prosecution did not reveal that the two complaining witnesses, in their initial statements to the investigating officers, had originally stated that their niece, and not themselves, had witnessed the charged event. After further discussion with the officers, they admitted that they, and not their niece, had been witness to the event. The officers did not include this in their report. This initial misrepresentation did come out in the cross-examination of the complaining witnesses.

Assuming, as Fiacco asks this court to do, that the officers' failure to reveal evidence is a basis for a section 1983 claim when Fiacco was not convicted, there was no due process violation in this case. There is no due process violation "if the evidence is disclosed to the defendant at a time when the disclosure remains of value." *United States v. Juvenile Male*, 864 F.2d 641, 647 (9th Cir. 1988). Here, the evidence came out at trial during cross-examination of the complaining witnesses and Fiacco was able to make full use of the information to impeach their testimony. Fiacco thus had an opportunity "to cure any prejudice caused by the delayed disclosure" of the impeachment evidence at issue. *United States v. Gordon*, 844 F.2d 1397, 1403 (9th Cir. 1988). Therefore, no due process violation occurred and summary judgment on this claim was appropriate.

Fiacco's fourth claim for relief was premised upon an alleged due process violation resulting from an unconstitutional policy, practice or custom of the City of Los Angeles. *See Monell v. Dept. of Soc. Serv.*, 436 U.S. 658, 690-691 (1978). Under *Monell*, local government may be held liable for constitutional deprivations

resulting from their policies, practices or customs. *Id.* Because no constitutional deprivation occurred under the facts of this case, summary judgment was proper on this claim as well.

The district court judgment is AFFIRMED.[1]

[1] Accordingly, Fiacco's request for attorneys' fees is denied.

APPENDIX B

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED
APR 7 1989
Clerk, U.S. District Court
Central District of California
By Deputy

Clerk, U.S. District Court
APR 10 1989
Central District of California
By Deputy

ROBERT L. FIACCO,
Plaintiff,

v.

CITY OF LOS ANGELES,
a municipal corporation; and
DARYL F. GATES,
TERRENCE DYMENT,
ROBERT KURTH and CARL WILHITE,
Defendants.

Case No. CV 88-00143 RG (Bx)

JUDGMENT

This matter came regularly before the court on April 3, 1989 for hearing on the motion of defendants CITY OF LOS ANGELES, DARYL F. GATES, in his official and individual capacities, TERRENCE DYMENT, in his official and individual capacities, ROBERT KURTH, in his official and individual capacities, and CARL WILHITE, in his official and individual capacities, for summary judgment. James K. Hahn, City Attorney, by Christine C. Patterson, Assistant City Attorney, and Henry Scott, Deputy City Attorney, appeared as attorney for defendants. Stevenson and DePasquale by Paul DePasquale, appeared as attorney for plaintiff. All pleadings and papers on file in the case having been read and examined by the court and arguments having been presented:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. Defendants CITY OF LOS ANGELES, DARYL F. GATES, in his official and individual capacities, TERRENCE DYMENT, in his official and individual capacities, ROBERT KURTH, in his official and individual capacities and CARL WILHITE, in his official and individual capacities, are awarded summary judgment as to the First, Second, Third and Fourth Causes of Action alleged by plaintiff on the following grounds:

(a) The facts as alleged and adduced by plaintiff do not demonstrate a deprivation of plaintiff's constitutional or statutory rights;

(b) The facts as alleged and adduced by plaintiff demonstrate that defendants' actions do not constitute error upon

which liability under 42 U.S.C. §1983 can be based; and

(c) The facts as alleged and adduced by plaintiff demonstrate that, if defendants' actions constitute error, such error was miniscule and caused plaintiff no harm upon which a cause of action may be maintained under 42 U.S.C. §1983.

2. Defendants DARYL F. GATES, TERRENCE DYMENT, ROBERT KURTH and CARL WILHITE, in their separate individual capacities, are awarded summary judgment as to the First, Second, Third and Fourth Causes of Action on the grounds that the facts as alleged and adduced by plaintiff demonstrates that each of these defendants enjoys qualified immunity from liability pursuant to *Harlow v. Fitzgerald* (1982) 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 403.

3. The Fifth, Sixth, Seventh, Eighth, Ninth and Tenth Causes of Action are dismissed on the basis set forth in *United Mine Workers v. Gibbs* (1966) 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218.

4. Defendants will recover their costs in this action, in an amount to be determined upon appropriate motion.

5. This order shall be without prejudice to a further motion by defendants for an award of attorney fees under 42 U.S.C. §1988.

DATED: 4/7/89

RICHARD A. GADBOIS, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE RICHARD A. GADBOIS, JR.,
JUDGE PRESIDING

ROBERT L. FIACCO,
Plaintiff,

vs.

CITY OF LOS ANGELES;
DARYL GATES, etc., et al.,
Defendants.

NO. CV 88-143-RG

REPORTER'S TRANSCRIPT OF PROCEEDINGS
Los Angeles, California
Monday, April 3, 1989

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LOS ANGELES, CALIFORNIA; MONDAY, APRIL 3, 1989; 10:00 A.M.

(Proceedings in unrelated matters heard.)

THE CLERK: Page 3, Item 5, Civil Docket 88-143-RG, Robert L. Fiacco vs. City of L.A., et al.

MR. COLE: Good morning, your Honor. Russell Cole, Stevenson & DePasquale for the plaintiff Robert Fiacco.

MR. DePASQUALE: Good morning, your Honor. Paul DePasquale of Stevenson & DePasquale for the plaintiff Fiacco.

MS. PATTERSON: Good morning, your Honor. Christine C. Patterson, Assistant City Attorney, and Henry Scott, Deputy City Attorney, for James Hahn, City Attorney, for moving party and all named defendants.

THE COURT: All right. What have you got to add to your papers, Ms. Patterson.

MS. PATTERSON: Your Honor, I think there's three critical points that the City's papers have made here. First is that we through [*sic*] down the gauntlet the way Celotex told us to. We didn't get the kind of response that any of the law as to summary judgment requires. The showing here by plaintiff that there is any evidence on which any of these causes of action should be allowed to go forward and be placed before a trier of fact is wholly inadequate legally.

The second critical point I think needs to be addressed here is the fact that the *Harlow v. Fitzgerald* case clearly provides to the individual defendants not just an affirmative defense, but immunity from suit. And we believe that the showing here is totally insufficient that they are not entitled to that qualified immunity. Again no facts by which that might be ruled upon have been raised by the plaintiff.

The third point I want to make is, I really think this is a case of no harm, no foul. That may sound somewhat harsh with respect to Mr. Fiacco.

THE COURT: Well, it must sound harsh to Chick Hearn, who must have some sort of an intellectual property right in that phrase, wouldn't you think?

MS. PATTERSON: I'm sure he does wish he was getting royalties every time someone borrows that.

THE COURT: I use it all the time, but he lets me do that.

MS. PATTERSON: I can't say that I have the same kind of arrangement, your Honor, but what I mean to suggest is, there is no right —

THE COURT: What you mean to suggest is that there's no deprivation involved in the facts in this case.

MS. PATTERSON: This is quite correct, because, in fact, the evidence that they've been complaining about came out at trial. The man was not convicted. That's just the way it is. Not every harm is addressable in this courtroom via lawsuit.

The last point I wish to make, your Honor, the only point really that is based on any point made in my opponent's papers is on the *Monell* issue. Plaintiff has made a point of alleging that Chief Gates and Captain Dyment are policy-makers. With respect to Chief Gates, they would get no argument from me. I'd like to argue about Captain Dyment.

But the point I think I need to have the Court's attention focused on is the fact that even if they are policy-makers, that in and of itself is not sufficient on which to establish a municipal policy. There still has to be some injurious act from which you are inferring implied policy by the acquiescense of policy-makers. And clearly all of the rest of that has not been shown here.

We believe that this motion as to each individual defendant, as to the City, and to each cause of action has proven that they have not survived their legal obligations under Rule 56.

THE COURT: You don't want to go back to City Hall and phone Captain Dyment and tell him you don't think he's a policy-maker, do you?

MS. PATTERSON: Well, sure I'd be happy to. And once I explained it to him, I think he'd probably go along with me.

THE COURT: Okay.

MS. PATTERSON: There are an awful lot of Captains, your Honor, and they do not really promulgate —

THE COURT: They're not all —

MS. PATTERSON: — any kind of official policy.

THE COURT: — the head of IAD, however.

MS. PATTERSON: Well, I quite agree with that, but one point I would make specifically about IAD is that there are probably few divisions within the Los Angeles Police Department that are supervised more closely by the upper echelon; that is, by above a Captain.

THE COURT: Okay. I'm very familiar with the structure over —

MS. PATTERSON: All right. Thank you, your Honor.

THE COURT: — there, thank you, as you may be aware.

Okay.

MR. COLE: The first point she raised was that there is no evidence of a *Monell* claim, and I'd like to state that at this time we are in the process of taking depo — they are in the process of taking depositions of our *Monell* witnesses, and we feel that evidence of a policy

and practice is coming forth. Those depositions are not yet concluded, so we can't put them in front of you in the form of a record.

We would be more than happy in sometime in the future, the not too distant future, to present to you evidence as those depositions are transcribed. But —

THE COURT: All right.

MR. COLE: — other than the initial act against Mr. Fiacco which started this lawsuit, I don't have a certified record that I can put in front of the Court at this point. And that's one of the things we argue, that this motion is a bit premature, in that they are — the City is now taking the depositions of our *Monell* witnesses and nonetheless is moving for summary judgment on that issue.

THE COURT: Okay.

MR. COLE: The next point is *Harlow vs. Fitzgerald.* The basis of *Harlow vs. Fitzgerald* is that no reasonable police officer could have believed that impeachment evidence was exculpatory under *Brady,* and that's just not true. Not only did — was it said in *Giglio* and *Bagley, U.S. vs. Bagley,* but also the California Supreme Court in 1975 in *People vs. Ruthford* came to the same, exact conclusion interpreting the Fourteenth Amendment. So it has been out there for a good long time. And if these police officers have the experience which they claim to have, they certainly should have been aware of it.

THE COURT: Do you want to respond to that?

MS. PATTERSON: Well, yes, sir, I do. With respect to the *Harlow* issue, it's not enough to say that all reasonable police officers can be informed or can be held to know that there is a law vis-a-vis exculpatory evidence.

If you look at *Mitchell v. Forsyth* and if you look at *Anderson,* you will see that *Harlow* has been interpreted

to mean that the individual police officer has to have reason to know that in this particular circumstance there is law dictating conduct on his part. And there is not a single case that has been brought before this Court to the effect that the kind of statement that this witness made, which was not perceived as significant and was therefore not disclosed by Lieutenant Kurth, there's not a single precedent holding that to be exculpatory evidence under any of the precedence cited by either of the parties here, because quite simply there is no such law.

THE COURT: Okay.

MS. PATTERSON: This is a classic *Harlow* situation.

THE COURT: All right. The motion for summary judgment is granted on the Section 1983 claims, and they are claims one through four, inclusive.

And I base that decision, Miss Patterson, principally on the ground that there has been no deprivation of due process here whatsoever. It was — if indeed the oversight of the officers in the initial stages of this investigation were — if they evolved error of any kind, it would be (a) minuscule and (b) did not cause any harm whatsoever.

I will also base that order of *Harlow against Fitzgerald*, but only secondarily.

Prepare an order for me to sign. I'll probably doctor it up a little bit, but leave out the *Monell* issue because the offer has been made this morning that the *Monell* thing is premature because of discovery that's going on right now.

MS. PATTERSON: Could I have one point on the *Monell* issue?

THE COURT: Let me finish.

The pendant state claims are dismissed under the authority of *United Mine Workers against Gibbs*.

Thank you, all.

MS. PATTERSON: Thank you, your Honor.

MR. DePASQUALE: Thank you, your Honor.

(Proceedings concluded.)